

1 BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

2 STATE OF MONTANA

3 \* \* \* \* \*

4 MIKE JUSTICE, )  
 )  
5 Appellant, )  
 )  
6 vs. ) OSPI 168-89  
 )  
 ) DECISION AND ORDER  
7 TRUSTEES, ROSEBUD COUNTY )  
 )  
8 SCHOOL DISTRICT NO. 19, )  
 )  
 Respondent. )

On March 29, 1989, the Board of Trustees of School District No. 19 of Rosebud County (hereinafter the "Board") decided not to renew the contract of Mike Justice, a nontenured teacher. In a letter dated April 4, Justice requested written reasons for his nonrenewal pursuant to Section 20-4-206, MCA. On April 11, the Board provided Justice with the reasons for his nonrenewal and attached a copy of a written evaluation dated February 23, 1989.

On May 1, 1989, Justice filed an appeal with the Rosebud County Superintendent of Schools citing Section 20-4-206, MCA. On May 4, 1989, the Rosebud County Superintendent of Schools sent a letter to Appellant informing him the reasons given by the Board met the "Bridger test" and that he was not entitled to a hearing through her office. On May 26, 1989, a Notice of Appeal was filed with the State Superintendent of Public Instruction. The parties filed briefs and oral argument was heard by the State

1 Superintendent on November 14, 1989.

2 Having reviewed the complete record, the briefs of the  
3 parties, and having heard oral argument, this Superintendent now  
4 makes the following decision.

5  
6 DECISION AND ORDER

7 The State Superintendent of Public Instruction has  
8 jurisdiction of this appeal under 20-3-107 (1)(a), MCA.  
9 A nontenured teacher has very limited rights to appeal his/her  
10 nonrenewal of employment by the board of trustees of a school  
11 district. In accordance with Section 20-4-206, MCA, the  
12 nontenured teacher may appeal if the board fails to respond to a  
13 timely request for written reasons. In addition, the nonrenewed  
14 nontenured teacher also has the right to an evidentiary hearing  
15 before the County Superintendent of Schools to prove that the  
16 school board abused its discretion in reaching its decision not  
17 to renew the teacher's contract.

18 This matter is remanded to the County Superintendent of  
19 Schools of Rosebud County with instructions to hold an evidentiary  
20 hearing in accordance with Rules of Procedure for all School  
21 Controversy Contested Cases, 10.6.101 et seq., Administrative  
22 Rules of Montana, and issue a final order in accordance with the  
23 decision in this appeal. The County Superintendent of Schools  
24 shall admit evidence relevant to deciding the following issue:  
25 Whether the Board of Trustees of Rosebud County School District

1 No. 19 abused its discretion when it decided not to renew  
2 Justice's teaching contract for the reasons stated in its letter  
3 of April 11, 1989.

4  
5 MEMORANDUM OPINION

6 The Montana Supreme Court in Bridger Education Association v.  
7 Board of Trustees, 41 St.Rptr. 533 (1984), concluded that the  
8 legislature created a legal privilege for nontenured teachers when  
9 it amended Section 20-4-206, MCA, requiring that the board of  
10 trustees furnish a written statement of the reasons for nonrenewal  
11 within 10 days of the receipt of a written request from the  
12 nonrenewed teacher. The Court concluded the legislature "must  
13 have intended to grant something of meaning when the requirement  
14 for stating reasons, upon request, was written into the statute.  
15 The specified reason 'to find a better teacher' serves no  
16 purpose."

17 Since the Bridger decision, school districts have argued that  
18 a nonrenewed nontenured teacher is not entitled to an **evidentiary**  
19 **hearing** before the County Superintendent under the Rules of School  
20 Controversy promulgated by the State Superintendent and set forth  
21 in Title 10, Chapter 6, subchapter 1 of the Administrative Rules  
22 of Montana (ARM). County Superintendents and the former State  
23 Superintendent accepted jurisdiction over appeals from nonrenewed  
24 nontenured teachers for the purposes of determining whether a  
25 board of trustees gave the teacher "written reasons" upon a timely

1 request and whether the given reasons met the "Bridger test."  
2 However, County Superintendents have held and the former State  
3 Superintendent affirmed that a nonrenewed nontenured teacher is  
4 not entitled to present evidence in accordance with 10.6.116, ARM,  
5 to test the veracity of the stated reasons. Wanty v. Trustees,  
6 Carbon County School District No. 34-3, OSPI 87-85, 5 Ed.Law 10  
7 (1986); and Schulte v. School District No. 24, OSPI 86-85, 5  
8 Ed.Law 13 (1986). Thus, there has been created an anomaly -- a  
9 contested case procedure where the parties cannot present  
10 evidence.

11 The main argument of respondent boards of trustees is based  
12 on the conclusion that permitting nonrenewed nontenured teachers  
13 a right to an evidentiary hearing is akin to granting "instant  
14 tenure." The nonrenewed nontenured teachers argue that clearly  
15 the legislature did not intend that a board of trustees could rely  
16 on its own creative imagination to "concoct" reasons for its  
17 decision not to renew a nontenured teacher's contract.

18 This State Superintendent is persuaded that it was not the  
19 intent of the legislature to insulate the reasons required under  
20 Section 20-4-206, MCA, from all scrutiny. Likewise, she is  
21 persuaded that the legislature did not intend to require a board  
22 of trustees to prove "good cause" for nonrenewal of a nontenured  
23 teacher's contract. As respondent boards argue, that would create  
24 "instant tenure." Are these the only alternatives? No. This  
25 Superintendent believes there is another alternative.

1 One of the official duties of the board of trustees is the  
2 employment of teachers for the district. Section 20-3-324 (1),  
3 MCA, states:

4 As prescribed elsewhere in this title, the trustees of  
5 each district shall:

6 (1) employ or dismiss a teacher, principal, or other  
7 assistant upon the recommendation of the district superin-  
8 tendent, the county high school principal, or other  
9 principal as the board considers necessary, accepting or  
10 rejecting any recommendation as the trustees in their sole  
11 discretion determine, in accordance with the provisions  
12 of Title 20, chapter 4.

13 In addition, a board's employment decisions must comply with  
14 the specific requirements of Title 20, Chapter 4, Part 2, MCA.  
15 Section 20-4-206 applies to the nonrenewal of a nontenured  
16 teacher's contract. Under these statutes the board of trustees  
17 of a school district is permitted to exercise its **discretion** in  
18 making nontenured teacher employment decisions. However, even  
19 discretion has its limits. The Montana Supreme Court discussed  
20 **abuse of discretion** in Jeppeson v. State of Montana, Department  
21 of State Lands, 40 St.Rptr. 1272, 667 P.2d 428 (1983), and stated:

22 At the outset, we reemphasize that the discretionary  
23 powers vested in the respondent department are broad in  
24 scope. Abuse of discretion, on the other hand, is not  
25 subject to as broad an interpretation. This Court has  
held that abuse of discretion involves: "not merely an  
error in judgment, but perversity of will, prejudice,  
passion, or moral delinquency, but it does not necessarily  
imply wrong-doing or a breach of trust, or import bad  
faith; it conveys, rather the idea of acting beyond the  
limit of discretion; the disregard of the evidence  
adduced; the basing of a decision upon incompetent or  
insufficient evidence; an exercise of discretion to an end  
or purpose not justified by, and clearly against, reason  
and evidence; a clear error in law in the circumstances.

1 [Citations omitted.]

2 ID at 1277 (citing Taylor v. County Commissioners, 128 Mont. 102,  
3 111 and 112 (1954) with approval.)

4 This Superintendent believes a board of trustees has broad  
5 discretionary power when deciding not to renew a nontenured  
6 teacher's contract. She is also of the opinion that a board of  
7 trustees of a school district can abuse its discretionary power.  
8 It is her opinion that a nonrenewed nontenured teacher has a right  
9 to an evidentiary hearing to prove that the board of trustees  
10 abused its discretion. This is a heavy burden.

11 In regard to the board's decision not to renew the contract  
12 of a nontenured teacher, the board is entitled to the disputable  
13 presumption that it acted with discretion. In an appeal by a  
14 nontenured teacher, the board of trustees is not required to prove  
15 that it had "good cause" for the nonrenewal. The teacher has the  
16 burden of proving that the board abused its discretion in deciding  
17 not to renew the nontenured teacher's contract.

18 This Superintendent believes that providing a nonrenewed  
19 nontenured teacher the opportunity to prove that a board of  
20 trustees abused its discretion will put boards of trustees on  
21 notice that they are not free to make arbitrary and capricious  
22 decisions. Such a hearing will help insure that the reasons  
23 relied upon by a board to decide not to renew a nontenured  
24 teacher's contract do, in fact, inform the teacher of "the  
25 undesirable qualities which merit a refusal to enter into a



1 further contract."

2 The Supreme Court in Jeppeson used the following phrases to  
3 describe abuse of discretion: "the disregard of the **evidence**  
4 adduced; the basing of a decision upon incompetent or insufficient  
5 **evidence**; an exercise of discretion to an end or purpose not  
6 justified by, and clearly against, reason and **evidence**; a clear  
7 error in law in the **circumstances**." (Emphasis added.) Only  
8 through a hearing process that admits relevant evidence will the  
9 trier of fact be able to decide whether a board of trustees abused  
10 its discretion in not renewing the contract of a nontenured  
11 teacher.

12 The remaining issue in this appeal is whether the hearing  
13 should be held before a Court of competent jurisdiction or a  
14 County Superintendent in accordance with rules adopted by the  
15 State Superintendent under Section 20-3-107, MCA.

16 Easton v. Trustees, Missoula County School District No. 11,  
17 OSPI 102-86, 5 Ed.Law 190 (1986); and Cummings v. Missoula County  
18 Trustees, OSPI 109-86, 6 Ed.Law 18 (1987), have been cited for the  
19 contention that a nontenured teacher has "recourse in the judicial  
20 forum" if the teacher believes the reasons given by the board are  
21 false. It is not prudent to require the teacher to file an action  
22 and pursue a remedy in two separate forums, administrative and  
23 judicial, to obtain a complete remedy. A nontenured teacher would  
24 have to file an appeal with the County Superintendent to determine  
25 whether or not the written reasons met the "Bridger test," as well

1 as file a writ in District Court to have the Court determine  
2 whether reasons given by the board were true.

3 Section 20-3-107 (3), MCA, states:

4 In order to establish a uniform method of hearing and  
5 determining matters of controversy arising under this  
6 title, the superintendent of public instruction shall  
7 prescribe and enforce rules of practice and regulations  
8 for the conduct of hearings and the determination of  
9 appeals by all school officials of the state.

10 In addressing the jurisdiction of a County Superintendent of  
11 Schools, the Montana Supreme Court held that under Section 20-3-  
12 210, MCA, the County Superintendent must hear and decide all  
13 matters of controversy arising as a result of decisions of the  
14 board of trustees. The Court held that as a general rule a  
15 claimant in the school system must exhaust administrative remedies  
16 before filing a complaint or petition in District Court. This  
17 general rule has three (3) limited exceptions. These exceptions  
18 are situations where state agencies have been directly granted  
19 primary jurisdiction, where the matter is governed by a specific  
20 statute or where the board has acted without or in excess of its  
21 jurisdiction. Canyon Creek Education Association v. Board of  
22 Trustees, Yellowstone County School District No. 4, 47 St.Rptr.  
23 93 (1990), (explaining Throssell v. Board of Trustees of Gallatin  
24 County School District No. 7, 45 St.Rptr. 1228 (1988)).

25 This State Superintendent believes that an appeal by a  
nontenured teacher should be heard and decided by a County  
Superintendent in accordance with the rules of controversy adopted



1 under 20-3-107, MCA. She believes the legislature intended to  
2 establish a uniform method of hearing and deciding school  
3 controversies. There is no statutory grant of jurisdiction to a  
4 District Court to hear a nontenured teacher's allegation that the  
5 reasons given by a board of trustees for nonrenewal are false.  
6 In order to get a hearing before a District Court, the nontenured  
7 teacher would have to rely on an extraordinary writ and contend  
8 that there is not a plain, speedy, and adequate remedy in the  
9 ordinary course of law.

10 In summary, this decision does not grant "instant tenure" to  
11 nontenured teachers. It does provide an opportunity for an  
12 evidentiary hearing before a County Superintendent at which the  
13 nonrenewed nontenured teacher has the burden of proving that the  
14 board of trustees abused its discretion in arriving at the  
15 decision to not renew the teacher's contract. This is clearly  
16 different than in an appeal of a board decision by a terminated  
17 tenured teacher. When a tenured teacher appeals the board of  
18 trustees' termination decision, the board, not the teacher, has  
19 the burden of proving that it had "good cause" for the termina-  
20 tion. The nontenured teacher has the burden of proof in an abuse  
21 of discretion hearing.

22 DATED this 23 day of March, 1990.

23  
24 Nancy Keenan  
25 NANCY KEENAN

10.6.128 APPELLATE PROCEDURE - DECISION (1) The decision and order of the superintendent of public instruction shall be final, subject to the proper legal remedies in the state/federal courts. Such proceedings shall be commenced no later than 60 days after the date of the decision and order of the state superintendent of public instruction. (History: Sec. 20-3-107(3), MCA; IMP, 20-3-107(3), MCA; NEW, 1982 MAR p. 1689, Eff. 9/17/82.)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 23<sup>d</sup> day of March, 1990, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to the following:

Jean Nolan  
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